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No. 80-2116

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's "check kiting" scheme falls within the prohibition of 18 U.S.C. 1014.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 639 F.2d 1311.

JURISDICTION

The judgment of the court of appeals (Pet. App. A22) was entered on March 19, 1981. The petition for a writ of certiorari was filed on June 13, 1981, and was granted on November 9, 1981. The grant of the petition was amended on December 7, 1981 (J.A. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land,

property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on one count of misapplying bank funds, in violation of 18 U.S.C. 656 (Count I),[1] and on two counts of "check kiting," in violation of 18 U.S.C. 1014 (Counts II and III).[2] He was sen-

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[1] Count I, in pertinent part, charged that (J.A. 2-3):

> Beginning on * * * December 20, 1977 and continuing * * * to May 9, 1978 * * * WILLIAM ARCHIE WILLIAMS, being an officer * * * of * * * Pelican State Bank * * * a bank the deposits of which are insured by [FDIC] * * * with intent to injure and defraud said insured bank, did willfully and knowingly misapply * * * monies and funds of said bank, in the amount of $58,055.44 * * * by converting to his own personal use said sum, all in violation of [18 U.S.C. 656] * * *.

[2] Count II, in pertinent part, charged that (J.A. 3):

> On * * * May 9, 1978 * * * WILLIAM ARCHIE WILLIAMS, did knowingly and willfully overvalue * * * a security, that is a check dated May 9, 1978, drawn on the account of W. A. Williams * * * at the Winn State Bank * * * in the amount of $58,500.00 * * * for the purpose of influencing the Pelican State Bank * * *, a bank the deposits of which are insured by [FDIC] * * *, upon an advance of money and extension of credit in that the Defendant presented said check for deposit at Pelican State Bank * * * and represented * * * to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the Defendant then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank * * * to cover said check, all in violation of [18 U.S.C. 1014] * * *.

Count III charged, in similar language, that on May 10, 1978, petitioner deposited a $60,000 check in the Winn State Bank, drawn on his account at the Pelican State Bank, for the pur-

tenced to six months' imprisonment on Count III and five years' probation on Counts I and II. The court of appeals affirmed (Pet. App. A1-A21).

1. The evidence at trial showed that, soon after purchasing a majority interest in the Pelican State Bank in Pelican, Louisiana, in 1975, petitioner appointed himself bank president (Tr. 121, 168-169, 171-172).[3] The bank was a relatively small institution, with only $3,000,000 in assets (Tr. 251).

For several years prior to petitioner's purchase of the bank, it had maintained a "dummy account" to pay checks drawn on the bank by customers who had insufficient funds in their individual checking accounts to cover their obligations (Tr. 6-7, 24-25). A check cleared through the dummy account would be paid from the bank's general assets and held in the account until the customer deposited sufficient funds of his own to cover the check. The check would then be posted to the customer's account and the figure for accumulated checks in the dummy account would be reduced. The dummy account statement was adjusted each business day to indicate the bank's loss of funds used to provide this overdraft service (Tr. 7, 25, 87-88). The bank apparently charged no interest for use of the dummy account (Tr. 114, 121-122).[4]

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pose of influencing the Winn State Bank to advance money when he knew he had insufficient funds in his Pelican account to cover the check (J.A. 3-4).

[3] "Tr." refers to the trial transcript.

[4] The dummy account was subject to criticism by bank management. The bank's board of directors requested petitioner to abolish the account, but petitioner took no action to eliminate it (Tr. 9). Petitioner was the only bank officer who utilized the account (Tr. 21).

Between December 1977 and May 1978, petitioner enjoyed essentially unlimited use of the dummy account. By May 2, 1978, petitioner's overdrafts amounted to $58,055.44—approximately 50% of the total overdrafts then covered by the dummy account (Tr. 9, 11, 37, 87-88, 124-125).

On May 8, 1978, federal and state bank examiners commenced an audit of the Pelican State Bank (Tr. 94). That same day, petitioner opened a personal checking account at the Winn State Bank in Winnfield, Louisiana, with a deposit of $4,649.97 (Tr. 64-65, 91; Pet. App. A5). The next day, May 9, petitioner deposited into his checking account at Pelican State Bank a check for $58,500 drawn on his newly opened account at Winn Bank (Tr. 28-30, 87-88). Prior to making that deposit, petitioner's account at Pelican showed a balance of $8.33 (Tr. 87). Pelican immediately credited the sum of $58,500 to petitioner's account. This covered petitioner's checks totalling $58,055.44, which previously had been cleared through the dummy account. At the close of business on May 9, 1978, petitioner's account at Pelican showed a balance of $452.89 (Tr. 28-30, 87; Pet. App. A5).

On May 10, 1978, petitioner deposited a $60,000 check drawn on the Pelican Bank into his Winn account (Tr. 62-64, 88-89). Winn accordingly credited the $60,000 to petitioner's account and routinely paid the May 9th check for $58,500 when the check cleared for payment on May 12, 1978 (Tr. 64, 89; Pet. App. A6). The $60,000 check, in turn, was presented by Winn to Pelican for payment. Because petitioner's account had insufficient funds to cover the check, however, Pelican again cleared the check through the dummy account (Tr. 32-34, 97).

Petitioner attempted to balance his Pelican account on May 16 by depositing a check for $65,000 drawn on his accounts at Sabine State Bank in Many, Louisiana (Tr. 89). Pelican credited petitioner's account for $65,000 upon deposit of the check, and posted to his account the $60,000 check that had cleared through the dummy account (Tr. 32-34, 97-98). Petitioner, however, had insufficient funds in his Sabine accounts to cover the $65,000 check, and Sabine refused payment when the check was presented on May 17, 1978 (Tr. 69-71; Pet. App. A6). Pelican therefore charged the $65,000 to petitioner's account on May 23 (Tr. 35-36). Petitioner then purchased a $65,000 money order with the proceeds of a real estate mortgage loan obtained from the Sabine Bank on May 18, 1978, and settled his account with Pelican State Bank (Tr. 68-69).

As a result of depositing checks whose face value uniformly exceeded the amount of funds backing them in his personal accounts at the drawee banks on the dates of the drafts, petitioner was able to obtain significant amounts of interest-free credit for substantial periods of time (Tr. 91, 114). For example, Pelican Bank credited petitioner's account with the $58,000 check drawn on Winn Bank from May 9, 1978, to May 12, 1978, when the check was presented to Winn for collection. Similarly, petitioner obtained interest-free credit from the Winn Bank from May 10, when he deposited the $60,000 check drawn on Pelican, to May 11, when Pelican cleared it through the dummy account. Finally, petitioner obtained $65,000 of interest-free credit from Pelican Bank from May 16, when he deposited a $65,000 check drawn on Sabine State Bank, to May 23, when he deposited a $65,000 money order in his Pelican

account to cover the check after Sabine had refused payment.

2. At the completion of trial, the trial judge charged the jury that petitioner could not be convicted unless the government proved beyond a reasonable doubt that he had committed each element of the offense charged against him (Tr. 308, 314). He emphasized that a separate crime or offense was alleged in each count of the three-count indictment, and that the evidence pertaining to each count should be considered separately (J.A. 36). The trial judge then summarized the prohibition of 18 U.S.C. 1014 as follows: "Whoever knowingly makes any false statement or report, or willfully over-values any * * * property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the [FDIC] * * * upon any application, advance, * * * commitment, or loan * * * shall be guilty of an offense * * *" (J.A. at 35-36). He further explained that the indictment alleged that petitioner violated the statute by engaging in check kiting, a "scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks" (*id.* at 36). He emphasized that check kiting "is not simply writing checks on a personal account, which may be temporarily overdrawn. Check kiting involves more than mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts, which, taken together, constitute a scheme built upon a series of false representations designed to give the defendant time and credit" (*ibid.*).

The trial judge instructed the jury that under Section 1014 the government must prove beyond a reasonable doubt that petitioner "knowingly and willfully [made] a false statement" to the bank, that this

false statement "concerned a material fact, that is, a fact which would influence the decision" of the bank, and the petitioner "made the false statement with fraudulent intent to influence the [bank] to extend credit" to him (J.A. 37). The judge added that a statement is "false" if it "relates to a material fact and is untrue and is then known to be untrue by the person making it" (*id.* at 38). In recognition of petitioner's defense that he lacked fraudulent intent, the court further instructed the jury that "the crucial question in check-kiting is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them. Hence, proof that the checks were eventually paid might well be pertinent to defendant's initial intent, that is, whether he intended to deceive the bank" (*ibid.*).

After instructing the jury, the trial judge asked counsel if there were any objections to the charge as delivered. Petitioner's attorney replied: "No, Your Honor" (Tr. 327). At the completion of its deliberations, the jury returned a verdict of guilty against petitioner on all three counts of the indictment.

3. The United States Court of Appeals for the Fifth Circuit unanimously affirmed petitioner's conviction, rejecting the contention that his check kiting scheme did not violate the provisions of 18 U.S.C. 1014.[5] After reviewing the literal statutory language

[5] The court of appeals also rejected petitioner's contention that the trial court erred in excluding certain evidence under Fed. R. Evid. 403. That contention, along with a claim that the trial court improperly instructed the jury, was renewed in the petition for certiorari in this Court (Pet. I). However,

of Section 1014, the court concluded that petitioner's argument that "Counts II and III of his indictment cannot fairly be deemed to set forth violations of this statute * * is simply without foundation" (Pet. App. A19). The court characterized the deceptive conduct alleged in Counts II and III as "classic incidents of check kiting" (*id.* at A20). Relying on its prior opinion in *United States* v. *Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980),[6] the court of appeals described "check kiting" as "a series of false representations" designed to obtain money or credit from a bank. Such conduct, the court concluded, clearly "violates § 1014" (Pet. App. A20).

SUMMARY OF ARGUMENT

18 U.S.C. 1014 clearly proscribes "check kiting" schemes of the kind practiced by petitioner. To be convicted under Section 1014, a defendant must know-

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on December 7, 1981, this Court limited its grant of certiorari to questions 3 and 4 presented in the petition, which deal solely with the scope of 18 U.S.C. 1014 (J.A. 40).

[6] In *United States* v. *Payne*, *supra*, 602 F.2d at 1217-1219, the Fifth Circuit rejected arguments identical to those presented by petitioner in this Court and held that 18 U.S.C. 1014 proscribes check kiting. The court concluded that a kited check constitutes a knowingly false statement made to a bank for the express purpose of obtaining a loan or advance of credit, within the plain language of Section 1014. The "meager" legislative history of the statute (602 F.2d at 1219) did not require a different result. On the contrary, "the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies. The statute therefore proscribes not only fraudulent statements given in connection with farm or construction loan[s] but 'all undertaking[s] which might subject the FDIC insured bank to risk of loss'" (*ibid.*, quoting *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978)).

ingly make a false statement, or willfully overvalue property or security, for the purpose of influencing the action of a federally insured financial institution with respect to an advance, commitment, or loan. Check kiting satisfies each of these elements.

In the typical check kiting scheme, a series of checks drawn on accounts with insufficient funds to cover the face value of the checks are systematically deposited in two or more banks, with the check kiter taking advantage of the time lag necessary to present the checks for payment to keep his "kite" afloat. A check utilized in a kiting scheme necessarily implies that the check kiter has sufficient funds on deposit to cover it, when in fact he does not, thus satisfying the "false statement" requirement of Section 1014. In addition, a kited check represents overvalued property or security because it purports to be supported by sufficient funds in the account on which it is drawn, when in fact it is not. Finally, the only purpose for kiting a check is to obtain interest-free use of the bank's funds during the life of the scheme. Thus, as a general matter, a check kiting scheme meets the requirement of Section 1014 that a false statement or overvaluation of security or property be made for the purpose of influencing a credit decision of a federally insured bank. The evidence at trial amply supported the jury's verdict that petitioner intentionally engaged in such a deceptive scheme in this case.

Nothing in the legislative history suggests that Section 1014 should be given a reading more restrictive than its plain terms permit. Although the statutes that preceded Section 1014 dealt principally with farm and homeowner loans, the addition of federally insured banks to Section 1014 in 1970 gave the sec-

tion additional breadth. Moreover, it is well established that the statute should not be narrowly construed to apply only to traditional loan transactions. *United States* v. *Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.), cert. denied, No. 80-2110 (Oct. 5, 1981); *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). Loan transactions of federally insured banks take countless forms, and there is no basis in the statute or its history for limiting its coverage to a subspecies of such transactions.

The legislative purpose behind Section 1014 is to "cover all undertakings which might subject the FDIC insured bank to risk of loss." *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. See also *United States* v. *Payne*, *supra*; *United States* v. *Pinto*, *supra*. The conclusion that Section 1014 covers check kiting schemes is necessary to give effect to Congress' broad purpose to protect the assets of federally insured financial institutions. See *United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 10-11; *Rubin* v. *United States*, 449 U.S. 424, 431 (1981). Petitioner's construction of Section 1014 "not only is cramped but conflicts with the plain meaning of the statute and its purpose as well" (*ibid.*). Indeed, it "would create a loophole in the statute that Congress simply did not intend to create" (*United States* v. *Naftalin*, 441 U.S. 768, 777 (1979)).

The other arguments presented by petitioner are likewise without merit. The "rule of lenity" only applies if there is a grievous ambiguity in the meaning of a statute. There is no such ambiguity in Section 1014. The statute, moreover, does not intrude upon the jurisdiction of the states or fundamentally

alter federal and state law enforcement responsibilities. To the contrary, it is most appropriate that federal authorities shoulder the burden of protecting federally insured financial institutions from fraudulent schemes.

Petitioner's claims that the indictment was insufficient and that Section 1014 improperly permits conviction without proof of specific intent to defraud are insubstantial. Petitioner's indictment closely tracked the language of Section 1014, and the evidence at trial plainly showed that petitioner was guilty of intentional misrepresentations to federally insured banks. Regardless of the mens rea requirements of other worthless check statutes, Congress is not precluded from proscribing intentional false statements and overvaluations of property or security made for the express purpose of influencing the credit decisions of federally insured banks.

ARGUMENT

PETITIONER'S "CHECK KITING" SCHEME FALLS WITHIN THE COVERAGE OF 18 U.S.C. 1014

"Check kiting" is the term commonly used to describe a scheme for obtaining credit by depositing a series of worthless checks in accounts maintained at different banks. Ordinarily, the scheme works as follows: The check kiter opens an account at Bank A with a nominal deposit. He then writes a check on that account for a large sum, such as $50,000. The check kiter then opens an account at Bank B and deposits the $50,000 check from Bank A in that account. At the time of deposit, the check is not supported by sufficient funds in the account at Bank A. However, Bank B, unaware of this fact, gives the check kiter immediate credit on his account at Bank

B. During the several-day period that the check on Bank A is being processed for collection from that bank, the check kiter writes a $50,000 check on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that check, Bank A gives the check kiter immediate credit on his account there, and on the basis of that grant of credit pays the original $50,000 check when it is presented for collection.

By repeating this scheme, or some variation of it, the check kiter can use the $50,000 credit originally given by Bank B as an interest-free loan for an extended period of time. In effect, the check kiter can take advantage of the several-day period required for the transmital, processing, and payment of checks from accounts in different banks, and, by manipulating the flow of checks into and out of his various accounts, can lead each bank to believe that his checks are supported by adequate funds at the time they are deposited. The banks, meanwhile, are deprived of the use of their funds. They also are exposed to serious losses if the check kiter decides to stop "covering" the checks. See *United States* v. *Young*, 618 F.2d 1281, 1284 n.2 (8th Cir.), cert. denied, 449 U.S. 844 (1980).[7] The evidence at trial showed that petitioner engaged in just such a scheme.

[7] The Federal Deposit Insurance Corporation, which insures the banks involved in this case, advises us that in 1980 it discovered 190 check kiting schemes practiced upon federally insured banks chartered under state law. These 190 incidents resulted in the extension of over $35,000,000 in interest-free credit to the participants in the check kiting schemes. In 1979, the FDIC uncovered 133 check kiting schemes; for 1978, the number was 162; for 1977, the number was 151; and for 1976, the number was 139. Check kiting cases constitute 8-9% of all apparent violations of the

The question presented in this case is whether petitioner's conduct constitutes a violation of 18 U.S.C. 1014, a comprehensive statute designed to protect the assets of federally insured lending institutions. Section 1014 makes it a criminal offense for anyone to "knowingly make[] any false statement or * * * willfully overvalue[] any * * * property, or security, for the purpose of influencing in any way the action of * * * any [federally insured] bank * * * upon any advance, * * * commitment or loan * * *." In order to establish a violation of this statute, the government must prove that the defendant knowingly made a false statement, or willfully overvalued property or security, for the purpose of influencing the bank's action in extending an advance, commitment, or loan.

As we demonstrate below, a check kiting scheme satisfies each of these elements. First, by depositing a check with a bank, the check kiter represents that he has on deposit funds equivalent to the face value of the check. Thus, as the facts of this case clearly show, the check kiter knowingly makes a "false statement" by depositing a check with full awareness that there are insufficient funds in the drawee bank to cover the check. Additionally, the check kiter "willfully overvalues" each of the checks deposited in furtherance of the scheme. Because the deposit of a check constitutes an implicit representation that it is supported by sufficient funds in the account on which

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criminal code involving FDIC insured state banks. The FDIC further reports that such schemes can lead to significant financial losses and represent a genuine threat to the solvency of some insured banks. The Federal Reserve Board has likewise reported one recent check kiting scheme that involved $9 million in worthless checks, and another that resulted in the insolvency of a federally insured institution.

it is drawn, the checks employed in a check kiting scheme are "overvalue[d]." Each check employed in the scheme, furthermore, constitutes both "property" and "security" within the meaning of the statute. Each check provides the basis for the bank's grant of a temporary extension of credit, and each is held by the bank as the means of recovering the funds that have been extended to the check kiter. Finally, the checks employed in a check kiting scheme are deposited for the purpose of obtaining immediate credit at the depositary bank. Such an extension of credit is a financial "advance," a "commitment," and a "loan." Thus, within the plain meaning of Section 1014, the checks employed in a check kiting scheme are false statements and overvalued property or security given "for the purpose of influencing * * * the action" of a bank "upon [an] advance, * * * commitment, or loan." 18 U.S.C. 1014.

A. The Plain Language of Section 1014 Establishes That The Statute Covers "Check Kiting"

As this Court frequently has stated, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 3; *Rubin* v. *United States*, 449 U.S. 424, 429-431 n.8 (1981); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *United States* v. *Naftalin*, 441 U.S. 768, 772-774 (1979); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). In this case, the plain language of Section 1014 covers "check kiting" schemes of the type engaged in by petitioner,

and as we show below, nothing in the legislative history of the statute indicates that Congress intended to exclude such schemes from the coverage of the statute. Section 1014 therefore should be read to apply to "check kiting," just as it applies to other schemes to obtain credit from federally insured lending institutions by means of intentional misrepresentations.

Section 1014 is remarkable because "[t]he statutory language is sweeping" (*Lewis* v. *United States*, *supra*, 445 U.S. at 60), embracing numerous entities in which the federal government has a financial stake, and proscribing, in the disjunctive, various types of deceptive schemes that might be used to inflict injury on such entities. "Each succeeding prohibition is meant to cover additional kinds of illegalities * * * [for] the purpose of affording added safeguards" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 774). The objective of the statute is apparent from its language: it was designed to protect all types of federally insured lending institutions from losses stemming from false statements or misrepresentations by persons obtaining financial commitments, advances, or loans. The language of the statute makes it clear that it was intended to be broad in scope, broad enough "to maintain the vitality of the FDIC insurance program * * * and 'to cover all undertakings which might subject the FDIC insured bank to risk of loss.' " *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.), cert. denied, No. 80-2110 (Oct. 5, 1981), quoting from *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). See also *United States* v. *Bush*, 599 F.2d 72, 75, rehearing denied, 603 F.2d 860 (5th Cir. 1979).

Although most convictions under Section 1014 involve false representations made in connection with conventional loan applications, the language and the purposes of the statute are not so limited. *United States* v. *Pinto*, *supra*, 646 F.2d at 838 (terms of Section 1014 "should not be so narrowly construed as to apply solely to funds extended in a loan situation"). See *United States* v. *Sher*, 661 F.2d 34, 35 (3d Cir. 1981) (Adams, J., dissenting from denial of rehearing en banc). Rather, the statute refers broadly to "any" false statement or report, and to overvaluations of "any" property or security. The list of transactions to which the statute applies is equally expansive: it refers to "any application, advance, discount, purchase, agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." 18 U.S.C. 1014. "These words do not lend themselves to restrictive interpretation" (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978)). If Section 1014 applied solely to a particular type of formal loan transaction, the extended list of covered transactions prescribed by Congress "would be rendered meaningless" (*United States* v. *Pinto*, *supra*, 646 F.2d at 838).

Thus, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage" (*United States* v. *Culbert*, *supra*, 435 U.S. at 373) to a particular kind of transaction; rather, Congress sought to legislate broadly, in order to address a general problem. A transaction such as "check kiting," therefore, which threatens the assets of federally insured banks in exactly the same way as a misrepresentation in an application for a loan, should not

be excluded from the reach of the statute simply because the broad generic terms of the statute do not identify check kiting by name or precise description. It is enough that check kiting falls within the literal language of the statute and creates the kind of economic risk that Congress meant to prevent. As we demonstrate in more detail below, "check kiting" schemes satisfy each element of a Section 1014 violation.

1. *A kited check embodies an intentional "false statement" within the meaning of Section 1014*

Section 1014 proscribes "any false statement" that is "knowingly" made for the purpose of influencing the action of a federally insured financial institution. Since a check kiting scheme involves the systematic writing and depositing of checks for which there are insufficient funds, a kited check plainly qualifies as an intentional "false statement" within the clear language of Section 1014.

The sweep of the "false statement" requirement of Section 1014, as is true of the other elements of the statute, is extremely broad: "any" false statement is proscribed. The courts, furthermore, have construed the provision to cover not only oral and written representations, but even failure to disclose material information needed to avoid deception.[8]

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[8] The fact that petitioner may not have made "any oral or written statement or representation" (Pet. Br. 5) at the time the checks were deposited is immaterial; the checks themselves constitute "false statements" within the meaning of Section 1014. Indeed, failure to make any statement revealing the truth, after presenting a worthless check made out in a large dollar amount, only serves to compound the deception.

United States v. *Sackett*, 598 F.2d 739, 741-742 (2d Cir. 1979) ("false statement" applies to both written and oral statements); *United States* v. *Greene*, 578 F.2d 648, 657 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (failure to disclose that equipment was subject to a lien constitutes a false statement). The typical check kiting scheme, therefore, clearly involves an intentional false statement: the check kiter represents, upon presenting the kited check, that he has sufficient funds on deposit to cover the check when in fact such funds are nonexistent. *United States* v. *Payne*, *supra*, 602 F.2d at 1218. As the facts at trial established, petitioner presented worthless checks in large face amounts without disclosure or warning. In this factual context, the jury could reasonably find that petitioner made an intentional misrepresentation with the intent to influence the bank.

Petitioner asserts (Pet. Br. 37-39), and one district court has agreed (*United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978)), that a kited check cannot constitute a false statement because it merely represents a contractual obligation of the drawer to pay a sum certain, which can be neither true nor false. But while there is no doubt that a check embodies a contractual obligation of the drawer to pay a sum certain, presentation of a check to a bank—without any contrary disclosure or warning—necessarily includes a representation that the drawer currently has funds on deposit sufficient to cover the face value of the check. A check is accepted with the expectation that it will be paid in the normal course of collection; a banker who realized that the drawer had no funds on deposit would not credit the check to the drawer's account or reduce it to cash.[9] A

[9] Petitioner's argument that his checks did not embody a statement that he had at least the face amount of the checks

"representation or statement as to the value of [a] check[]" is one of the "necessary implications" of writing the document. *United States* v. *Payne, supra,* 602 F.2d at 1218. Indeed, even petitioner concedes (Pet. Br. 28-29) that prosecutions under state bad check laws do not rest upon the defendant's breach of a contractual "promise * * * that the check [will] be paid upon due presentment," but upon the fact that in presenting a bad check the defendant has been "guilty of such fraud and misrepresentation as to be punishable as a crime * * *" (Pet. Br. 28-29 n.17 (emphasis omitted), quoting F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965)).[10] Regardless of any contractual breach involved in check kiting, and indeed in spite of the fact that the kited

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on deposit is contrary to the common understanding of the hundreds of thousands of persons who each day accept checks (often drawn on out-of-state banks) as payment for goods, services, or some other obligation. In common usage, the *check itself* is considered payment, notwithstanding the more technical view that it is merely a promise to pay if the check is dishonored. Moreover, the trial judge here instructed the jury that it could not convict unless it believed petitioner had made misrepresentations with an intent to deceive (J.A. 37-38). The jury found against petitioner on that factual issue.

[10] Petitioner apparently assumes that although a check may constitute a misrepresentation of fact under state law, it cannot be a "false statement" under federal law (Pet. Br. 28-29 & n.17). If, however, a kited check constitutes fraud or misrepresentation under state law, it most certainly falls within the unambiguous sweep of a federal statute proscribing "any false statement." Moreover, the fact that a 1965 legal treatise did not cite Section 1014 in its discussion of false statements and bad checks is of no help to petitioner (Pet. Br. 28-29 & n.17). Section 1014 did not generally extend to federally insured banks until 1970 (Pub. L. No. 91-609, Title IX Section 915, 84 Stat. 1815).

checks may eventually be paid,[11] a person who writes a series of checks knowing that there are no funds on deposit to cover them has made intentional false representations within the reach of Section 1014.

2. *A kited check is "willfully overvalue[d]" "property" or "security" within the meaning of Section 1014*

As we have demonstrated above, petitioner violated Section 1014 because he intentionally made a misrepresentation to a federally insured bank for the purpose of obtaining credit. In addition to this, however, petitioner violated the statute for a separate and independent reason. As the facts of this case show, petitioner "willfully overvalue[d]" "property" or "security" presented to the bank in order to obtain credit. Since the statute is worded in the disjunctive, this is a separate basis for imposing liability in a check kiting case.

In the typical check kiting scheme, the check that is deposited in order to obtain immediate credit is in fact worthless or nearly worthless. As the depositor realizes, the check is supported by only minimal funds in the account on which it is drawn. Thus, while the checks involved in this case were drawn in face amounts exceeding $50,000, they were in fact worthless, or nearly so, as petitioner well knew.

The reason that a check kiting scheme works, as the check kiter knows, is that the bank in which the check is deposited regards the check as an implicit representation that it is supported by adequate funds

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[11] See *United States* v. *Foshee*, 578 F.2d 629, 631 (5th Cir. 1978) (reimbursement or restitution does not "absolve[] one from the crime of check kiting" in a prosecution under the federal mail fraud statute, 18 U.S.C. 1341).

in the account on which it is drawn. See *United States* v. *Payne*, *supra*, 602 F.2d at 1217; *United States* v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc); F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965) ("In giving a check, the drawer impliedly represents that he has on deposit with the drawee bank funds equivalent to the face amount of the check"). It is essential to the success of the scheme that the bank accept this representation; if the bank questions it and inquires into the status of the account on which the check is drawn, the scheme will collapse. It would be more prudent, of course, for a bank to make such an inquiry when large checks are involved, just as it would be prudent for banks to inquire more carefully into the accuracy of representations made about the value of collateral pledged as security for conventional loans. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431. However, such an inquiry is by no means a necessary predicate for prosecution under Section 1014, which places the burden of avoiding false representations on the person who seeks the funds of the federally insured bank. The customer is meant to be dissuaded from making "any" false representation, and from "willfully overval[uing]" any security or property to obtain use of the bank's funds. A kited check is "willfully overvalued," within the meaning of the statute, just as worthless securities that are presented as collateral for a loan are "willfully overvalued." See *United States* v. *Calandrella*, 605 F.2d 236 (6th Cir.), cert. denied, 444 U.S. 991 (1979).

Section 1014 applies to the willful overvaluation of "any land, property, or security." Again, this element of the statute is cast in broad, rather than restrictive terms. Congress plainly intended to pro-

scribe the willful overvaluation of any thing of value given to a lending institution. There is no suggestion that the broad generic terms "any * * * property or security" were meant to exclude items such as checks presented to obtain a temporary extension of credit. Petitioner argues strenuously that the statute must be interpreted to exclude checks. But, as this Court stated in another context, "[t]he short answer is that Congress did not write the statute that way" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 773). Moreover, it is entirely consistent with the purpose of the statute to read this terminology to include checks submitted for such a purpose.

Section 1014 applies, by its literal terms, to "any" species of "property." Giving that term its "ordinary, contemporary, common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), it is plain that it applies to checks with a face value of over $50,000.[12] As petitioner is quick to point out (Pet. Br. 37-39), a check is a demand to a drawee to pay a sum certain of money, which is backed by a promise of the drawer to make payment in the event of default. And, in ordinary business affairs, checks are treated as the functional equivalent of money. Thus, a check is plainly a kind of "property," and Section 1014 is broad enough to encompass overvalued checks presented to federally insured banks to obtain credit. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 340 (1979) ("money" is a form of "property").

Beyond this, Section 1014 applies, by its literal terms, to "any" species of "security." While the term "security" is not defined in Section 1014, it is

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[12] Property is synonymous with "wealth" or "a valuable right." *Webster's Third New International Dictionary* 1818 (1976 ed.).

defined in other sections of Title 18, where it is uniformly understood to include checks. For example, in the National Stolen Property Act, 18 U.S.C. 2311 *et seq.*, the term "security" is specifically defined to include "any * * * check." 18 U.S.C. 2311. Likewise, in the general definitional portion of Title 18, the term "obligation or other security of the United States" is defined to include "all * * * checks, or drafts for money." 18 U.S.C. 8.[13] The definition of "security" that is consistently employed in Title 18 refers to items that represent some other thing of value. Under this definition, a check clearly qualifies as a "security."[14]

Moreover, it is clear that when a bank extends credit on the basis of a deposited but uncollected check, it gains a "security interest" in the check,

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[13] Although the definition contained in 18 U.S.C. 8 applies to the term "obligation" as well as "security," the section makes it clear that the drafters regarded an obligation as simply one kind of security, *i.e.*, a subset of the more general category of "securities." See also 18 U.S.C. 471-474 (using the term "obligation or other security"); 18 U.S.C. 335 (referring to "check, draft or other security"); 18 U.S.C. 955 (referring to "bonds, securities, or other obligations").

[14] Petitioner suggests in passing that the term "security" in Section 1014 should be defined as it is in the Securities Act of 1933 and the Securities Exchange Act of 1934 (Pet. Br. 31-32). This assertion is without merit. Those statutes serve purposes that are, in substantial measure, distinct from criminal laws focusing on fraudulent banking practices. They deal in the main with investment transactions, and contain their own definitions of the term "security". See the brief for the Securities and Exchange Commission as amicus curiae in *Marine Bank* v. *Weaver*, No. 80-1562 (argued Jan. 11, 1982). Because Section 1014 deals solely with banking frauds rather than investment frauds, the definitions of "security" contained in the federal securities laws do not control here.

which secures the extension of credit until such time as the check is collected. The Uniform Commercial Code makes this point explicitly. Section 208 of Article 4 of the U.C.C. (1952 version) provides:

> (1) A bank has a security interest in an item [including a bank check] * * *
>
> (a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;
>
> (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge back; or
>
> (c) if it makes an advance on or against an item.
>
> * * * * *
>
> (3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item * * *. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item * * * for purposes other than collection, the security interest continues and is subject to the provisions of Article 9 except that
>
> (a) no security agreement is necessary to make the security interest enforceable * * *.

The only significant change made in this provision by Louisiana law is the substitution of the word "lien" for "security interest" (La. Rev. Stat. Ann. § 10:4-208 (West Cum. Supp. 1980)), which was done not to change the substantive content of the statute but rather to avoid "reference to Article 9 [U.C.C.]

concepts that have not been adopted in Louisiana" (*id.* at comment).[15]

Although petitioner implies otherwise (Pet. Br. 32), regardless of whether the banks in this case had a "security interest" or a "lien" on the kited checks, the checks were still held as security for the credit that was extended upon deposit of the documents.[16] Thus, using either the definition of "security" prescribed by Congress in Title 18, or the definition of "security" ordinarily used in commercial law, the term "security" contained in Section 1014 includes a check that is deposited in order to obtain an immediate extension of credit.

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[15] La. Rev. Stat. Ann. § 10:4-208 (West Cum. Supp. 1980) provides, in pertinent part:

> A bank has a lien on an item * * *
>
> (a) in the case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;
>
> (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or
>
> (c) if it makes an advance on or against an item.
>
> * * * * *
>
> (3) Receipt by a collecting bank of a final settlement for an item is a realization on its lien on the item * * *. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the lien continues except that
>
> (a) no agreement is necessary to make the lien enforceable * * *.

[16] See *Webster's Third New International Dictionary* 2054 (1976 ed.), defining "security" to include "property given or serving to make secure the enjoyment or enforcement of a right."

3. *A kited check is used "for the purpose of influencing" the action of a bank upon an "advance, commitment, or loan"*

The final element of Section 1014 is likewise satisfied in a check kiting case. The whole purpose of the scheme is to obtain an immediate extension of credit, and to do so by depositing a check that purports to be supported by adequate funds at the drawee bank. The bank that extends funds on the basis of the deposited but not yet collected check clearly makes an "advance," a "commitment," and a "loan" within the ordinary meaning of those terms. See *United States* v. *Western Contracting Corp.*, 341 F.2d 383, 386 (8th Cir. 1965) (an advance); *Universal C.I.T. Corp.* v. *Guaranty Bank & Trust Co.*, 161 F. Supp. 790, 793 (D. Mass. 1958) (a loan); *Falconi* v. *FDIC*, 257 F.2d 287, 289 (3d Cir. 1958) (credit); *United States* v. *Street*, 529 F.2d 226 (6th Cir. 1976) (check kiting is the obtaining of "forced credit"). J. White & R. Summers, *Uniform Commercial Code* 558 (2d ed. 1980); F. Whitney, *supra*, § 310, at 449; U.C.C. § 4-208 (1952 version). See also *United States* v. *Stoddart*, *supra*, 574 F.2d at 1051-1053 (extension of credit based on defendant's statement that a deposit had not been credited to his account constitutes a "commitment" under Section 1014).[17]

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[17] The ordinary meaning of the words used by Congress plainly applies to the facts of this case. *Webster's Third New International Dictionary* 30 (1976 ed.) defines the term "advance" to include "money or other value" given "in expectation of repayment or other future adjustment." "Loan" includes "money" "lent for the borrower's temporary use" or "the grant or temporary use made by a lender" (*id.* at 1326). The word "commitment" is broader still, embracing any "engagement" to "assume a financial obligation" (*id.* at 457).

Petitioner's argument on this point (Pet. Br. 14-24) misses the mark. He contends that check kiting is not within the reach of Section 1014 because the statute focuses upon loans and extensions of credit. We agree that extensions of credit are the main (although not exclusive) target of the statute. Our point, however, is that check kiting is covered by the statute for the simple and sufficient reason that it, like a loan, results in an extension of credit. If a worthless check is submitted to a bank for reasons other than to obtain an extension of credit, the conduct is simply not check kiting in the ordinary sense of the term, and would not fall within the prohibition of Section 1014. However, if a properly instructed jury concludes that a worthless check was submitted in order to obtain immediate credit from a bank, there is no reason, even under petitioner's construction of the statute, to regard the conduct as falling outside the reach of Section 1014.[18] Petitioner maintains that the statute cannot be applied to schemes to obtain temporary use of funds by check kiting, but as this Court said

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[18] The jury in this case was properly instructed that it could convict petitioner only if it found beyond a reasonable doubt that he had deposited checks "for the purpose of influencing" the Pelican State and Winn State Banks in extending an "advance, * * * commitment, or loan." 18 U.S.C. 1014. The court emphasized that petitioner could not be found culpable for "simply writing checks on a personal account, which may be temporarily overdrawn." J.A. 36. The jury could find a violation of Section 1014 only if it concluded that petitioner had undertaken "a series of false representations designed to give [himself] time and credit." *Ibid.* Specifically, a violation of Section 1014 could be established only if the jury found petitioner had deposited the checks in question with an "intent to influence the [Pelican State and Winn State Banks] to extend credit to [petitioner]." J.A. 37, 38.

in interpreting another federal criminal statute, "[n]othing on the face of the statute supports this reading of it" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 772). Indeed, it is fair to say here, as in *Naftalin*, that petitioner's construction "would create a loophole in the statute that Congress did not intend to create" (*id.* at 777).

For these reasons, we submit that the petitioner's check kiting scheme falls within the plain language of Section 1014. Accordingly, unless there is something in the legislative history of the statute that clearly indicates an intention to exclude schemes such as check kiting from the coverage of the statute, Section 1014 should not be read to bar prosecution for such schemes. As we demonstrate below, the legislative history does not suggest that the literal language of the statute should be narrowly construed, or that check-kiting should be exempted from its coverage. Quite to the contrary, the legislative history shows that the statute was designed to provide broad protection to federally insured lending institutions against misrepresentations made in the course of transactions in which the assets of such institutions are placed at risk. That broad protective purpose directly supports the literal interpretation of the statute adopted by the court below.

B. Nothing in Section 1014's Legislative History Evidences a Clear Congressional Intent to Exclude Check Kiting from the Coverage of the Statute

The unambiguous language of Section 1014 clearly proscribes conduct commonly referred to as "check kiting." When statutory language is clear, "judicial inquiry is complete, except in 'rare and exceptional circumstances' ". *Rubin* v. *United States*, *supra*, 449 U.S. at 430. See *United States* v. *Turkette*, No.

80-808 (June 17, 1981), slip op. 3, quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[I]n the absence of 'a clearly expressed legislative intent to the contrary, [unambiguous] language must ordinarily be regarded as conclusive' "). Petitioner has pointed to no clearly expressed legislative desire to exclude check kiting from the reach of Section 1014.

As petitioner states in his brief (Pet. Br. 14-22), Section 1014 is a composite of various statutes dealing with specific lending institutions. The language ultimately adopted in the statute, however, "does not occur in any one of the original sections." Section 1014 is "a composite of terms and transactions mentioned in each." 18 U.S.C. 1014 (Historical and Revision Notes). Moreover, while the original statutes combined in Section 1014 may have focused primarily on loan transactions involving farmers and homeowners (Pet. Br. 15-16), federal courts uniformly have recognized that the language of the statute goes beyond these transactions. See, e.g., *United States* v. *Sabatino*, 485 F.2d 540, 543-544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (the literal terms of the statute apply to automobile loans); *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053 (Section 1014 is not confined to traditional loan transactions; an extension of credit based upon a claimed deposit of a check is a covered "commitment" under the statute). Since 1970, Section 1014 has specifically applied to all federally insured banks. Pub. L. No. 91-609, Title IX, Section 915, 84 Stat. 1815. If Congress had intended to limit the protection of Section 1014 solely to traditional loan transactions of such banks, it certainly would have described the covered transactions with language less expansive than "any application,

advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same * * *." 18 U.S.C. 1014. See *United States* v. *Turkette, supra,* slip op. 4.[19]

Petitioner has pointed to no relevant legislative history that evidences a congressional desire to limit the common meaning of the words used in Section 1014.[20]

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[19] This Court should "decline the invitation to limit the statute's scope by reference to an undefined category" (*United States* v. *Culbert, supra,* 435 U.S. at 380)—such as "commercial and personal loan or credit transactions" (Pet. Br. 23). Such a gloss would introduce serious ambiguity in the statute, since its contours could only be guessed. See *Culbert, supra,* 435 U.S. at 374.

[20] Petitioner relies on a statement in the legislative history referring to the addition in 1964 of federal credit unions to Section 1014. During the debate on that amendment, the sponsor stated that the amendment "broadens existing law only to the extent of adding [credit unions] to the statute." 109 Cong. Rec. 24791-24792 (1963). That statement, however, is largely irrelevant in determining the current scope of Section 1014. Check kiting could not have been prosecuted under the statute in 1964 because banks providing general checking services were not added to Section 1014 until 1970. Pub. L. No. 91-609, Title IX, Section 915, 84 Stat. 1815. Furthermore, while the addition of credit unions in 1964 may not have extended the reach of Section 1014 beyond the realm of traditional loan transactions, the addition of federally insured banks in 1970, with their wide range of commercial activities, gave significantly broader scope to the language of Section 1014. See *United States* v. *Payne, supra,* 602 F.2d at 1219. There is no evidence that Congress in 1970 believed that addition of federally insured banks broadened existing law "only to the extent of adding them to the statute" (Pet. Br. 22, quoting 109 Cong. Record 24791-24792 (1963)). Federally insured banks are protected under Section 1014 from deceptive schemes respecting any "loan", "commitment" or "advance" that occur in the course of their commercial banking functions.

On the contrary, there are several statements in the legislative history that evidence a congressional intent to give the terms of Section 1014 a comprehensive scope. Thus, the statute is not "limited by its terms to borrowers and would seem also to apply to others" (S. Rep. No. 1078, 88th Cong., 2d Sess. 4 (1964)). It is designed to provide "penalties for making false statements or reports in connection with loans *or other similar transactions.*" H.R. Rep. No. 91-1556, 91st Cong., 2d Sess 35 (1970) (emphasis added); H.R. Rep. No. 91-1784, 91st Cong., 2d Sess. 66 (1970) (emphasis added). Certainly a check kiting scheme, in which repeated false representations are made to a bank in order to obtain the use of its funds, is similar to a transaction in which a loan is obtained by means of false statements or reports.[21]

In short, a review of the legislative history of Section 1014 reveals no legislative intent to confine the statute to a particular form of credit transaction. "The purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss." *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. See also *United States* v. *Pinto*, *supra*, 646 F.2d at 838. With no clear indication that Congress sought to exclude check kiting from the reach of Section 1014, this Court should afford the language of the statute its full scope and thereby

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[21] Of course, it is completely irrelevant that "check kiting" was not mentioned by name during the legislative debates. Countless credit transactions went without specific mention, but undoubtedly are covered by the generic language of the statute. See *Barr* v. *United States*, 324 U.S. 83, 90 (1945): "if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."

give effect to Congress' broad protective purposes. See *United States* v. *Naftalin*, *supra*, 441 U.S. at 772-778; *Rubin* v. *United States*, *supra*, 449 U.S. at 429-431.[22]

A holding that Section 1014 reaches check kiting does not produce an absurd result, render the statute internally contradictory, or diverge from legislative policy. To the contrary, Congress' policy, manifest in Section 1014 and elsewhere throughout Title 18 of

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[22] The cases relied upon by petitioner to support his legislative intent argument (Pet. Br. 24) proceed on a faulty premise. *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa.), aff'd, 657 F.2d 28 (3d Cir. 1981), petition for cert. pending, No. 81-1047; *United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978); *United States* v. *Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). Instead of first examining the language of the statute and then looking to the legislative history to see if Congress clearly intended a narrower construction, these courts looked to the legislative history for affirmative indications of congressional intent to include check kiting within Section 1014. They apparently believed that, absent explicit mention of check kiting in the debates, Congress simply could not have meant to include check kiting within the broad reach of Section 1014. The court in *Sher*, for example, stated that while the legislative history of Section 1014 was "scant," it found "nothing in it indicating that § 1014 was meant to include check-kiting in its prohibition." *United States* v. *Sher*, *supra*, 505 F. Supp. at 861. This Court has left no room to doubt that this method of construing a statute is improper. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). This Court repeatedly has rejected arguments that "would permit an omission in the legislative history to nullify the plain meaning of a statute." *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980).

the United States Code, is that federal criminal sanctions are necessary to provide federally insured banking institutions with comprehensive protection against practices that cause risk of loss.[23] *United States* v. *Turkette*, *supra*, slip op. at 10-11; *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 108. Petitioner's construction of Section 1014, on the other hand, would result in a large loophole in the protection afforded these institutions. A bank's protection against false statements intended to influence credit transactions would depend not upon whether the misrepresentations had been made in connection with a loan, advance, or commitment, but rather upon whether a court concluded that the transaction was "traditional" or found that Congress had listed the transaction by name in a committee report.[24] Thus, far from conflicting with the legislative

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[23] Congress has enacted many criminal statutes that safeguard the integrity of federally insured financial institutions. Proscription of check kiting activities injurious to federally insured institutions is fully consistent with that scheme. See 18 U.S.C. 212 (offering loans or gratuities to bank examiners by bank officials); 18 U.S.C. 213 (accepting loans or gratuities from bank officials by bank examiners); 18 U.S.C. 493 (forging, counterfeiting, or passing, bonds and obligations); 18 U.S.C. 655 (theft from banks by bank examiners); 18 U.S.C. 656 (theft, embezzlement or misapplication from banks by officers or employees); 18 U.S.C. 709 (false advertising of claims that bank deposits are insured by FDIC); 18 U.S.C. 1005 (unauthorized issuance of notes, certificates of deposit, etc.); 18 U.S.C. 1006 (falsification of records by FDIC officials); 18 U.S.C. 1007 (false or misleading statements to the FDIC); 18 U.S.C. 1906 (disclosure of confidential information from bank examination reports); 18 U.S.C. 2113 (bank robbery and associated crimes).

[24] Modern money-center commercial banks make financial commitments, advances, and loans in countless forms. And, as

intent behind Section 1014, the court of appeals' conclusion that the statute proscribes check kiting activity furthers the legislative purpose to maintain the integrity of federally insured banking institutions. *United States* v. *Bush*, *supra*, 599 F.2d at 75.

C. The Other Arguments Advanced by Petitioner Do Not Require Reversal of His Conviction

Interspersed throughout his general contentions regarding the scope of Section 1014, petitioner has presented arguments that his conviction must be reversed because of the "rule of lenity", because giving Section 1014 a literal reading would produce an undue intrusion into the jurisdiction of state law enforcement officers, and because the indictment was inadequate to charge check kiting or a violation of Section 1014. These miscellaneous contentions are without merit.[25]

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commercial banking practices evolve, those forms likewise evolve. See, *e.g.*, E. Reed, R. Cotter, E. Gill & R. Smith, *Commercial Banking* 196-310 (1976). Restriction of the statute to "traditional" lending practices would result in serious ambiguities and would defeat the protective purposes of Congress. Congress adopted broad generic language to avoid such artificial restrictions, and to avoid the need to set forth a lengthy catalogue of protected transactions.

[25] Petitioner also asserts that, if this Court reverses his conviction under Section 1014, it also should remand the case for a new trial on the charges brought against him under 18 U.S.C. 656 (Pet. Br. 4 n.3, 40). This argument, resting solely on the claim that evidence of "check kiting" unduly prejudiced petitioner's trial on the count alleging misapplication of bank funds, is totally without merit. Petitioner's conviction under 18 U.S.C. 656 rested on his misuse of Pelican State Bank's "dummy account" between December 20, 1977 and May 9, 1978 (Pet. App. A7-A8). Petitioner's check kiting

1. The rule of lenity is merely "a[] guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), which is not applicable unless there is such a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Moreover, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Calla-*

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activities, though related to his use of the "dummy account," took place at a later time (Pet. App. A8-A9). The jury, furthermore, was repeatedly instructed that each count of the indictment alleged a discrete offense, and that it was required to consider separately the evidence applicable to each count (J.A. 36):

> Remember a separate crime of [sic] offense is charged in Counts II and III. You should consider the evidence pertaining to each count separately. The offense charged in each count is completed only after each of the essential elements you are about to hear is proven beyond a reasonable doubt. If the Government fails to prove any element of the offense charged in that count then the defendant must be acquitted as to that count.

See also Tr. 314-315. The jury is presumed to be able to follow instructions of this kind. See *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) ("the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform").

nan v. *United States*, *supra*, 364 U.S. at 596. As the Court observed in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, e.g., *United States* v. *Naftalin*, 441 U.S. 768, 778-779 (1979); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975); *id.* at 795 (Douglas, J., dissenting); *id.* at 798 (Brennan, J., dissenting).

Contrary to the repeated suggestions of petitioner (Pet. Br. 23, 31-32), there is no ambiguity in Section 1014 that requires this Court to read the statute "more restrictively than its language would permit." *United States* v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc). The evident statutory purpose of Section 1014 is to protect all federally insured lending institutions from losses arising out of false statements or misrepresentations made by persons doing business with them. *United States* v. *Pinto*, *supra*, 646 F.2d at 838; *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. A check kiting scheme intended to "result in the advance of credit," which involves representations that "checks presented for deposit are supported by adequate funds" when such "representations are false," falls within the plain language of Section 1014.

United States v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc). Since, as noted above, there is no basis in the legislative history of Section 1014 to argue that check kiting schemes were *not* intended to be covered by the statute, the rule of lenity does not require this Court to read the statute restrictively. *United States* v. *Turkette*, *supra*, slip op. 11 n.10.

2. Petitioner's contention that an unrestricted reading of Section 1014 results in "a major expansion of federal criminal jurisdiction" (Pet. Br. 27) and a serious intrusion "upon notions of judicial comity" (*id.* at 29) is completely without merit. Construction of a statute in light of the federal-state balance "only appl[ies] 'when we are uncertain about the statute's meaning.' " *United States* v. *Culbert*, *supra*, 435 U.S. at 379, quoting *Scarborough* v. *United States*, *supra*, 431 U.S. at 577. Such considerations are inappropriate where, as here, the conduct at issue (check kiting) falls within the scope of clear statutory language and application of the statute to that conduct furthers the legislative purpose behind the statute. See *United States* v. *Culbert*, *supra*, 435 U.S. at 379. Furthermore, even assuming that federalism concerns are relevant to the construction of Section 1014, those concerns are clearly insubstantial in the context of this case. The federal government, which provides deposit insurance, has a paramount interest in safeguarding the financial integrity of federally insured banking institutions. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431 n.8; *Perrin* v. *United States*, *supra*, 444 U.S. at 49-50. Moreover, check kiting already is subject to prosecution in federal courts under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. See, e.g., *United States* v. *Giordano*, 489 F.2d 327 (2d Cir. 1973); *United*

States v. *Constant*, 501 F.2d 1284 (5th Cir. 1974), cert. denied, 420 U.S. 910 (1975); *United States* v. *Hendrickson*, 394 F.2d 807 (6th Cir. 1968), cert. denied, 393 U.S. 1031 (1969); *United States* v. *Strauss*, 452 F.2d 375 (7th Cir. 1971), cert. denied, 405 U.S. 989 (1972); *United States* v. *Young*, 618 F.2d 1281 (8th Cir.), cert. denied, 449 U.S. 844 (1980); *United States* v. *Gross*, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970). A check kiting prosecution under Section 1014, which by its terms applies only to federally insured financial institutions, therefore results in no new inroad upon state criminal jurisdiction.[26]

3. Petitioner also argues that the indictment was inadequate to charge him either with a violation of Section 1014 (Pet Br. 33) or check kiting in general (*id.* at 13, 35-37). These contentions are insubstantial.

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[26] As noted above, Congress has provided comprehensive criminal sanctions to protect federally insured financial institutions. See note 23, *supra*. The protection against check kiting afforded by Section 1014 is consistent with this scheme —Congress has sought to fully protect the integrity of the federal insurance program. *United States* v. *Bush*, *supra*, 599 F.2d at 75; *United States* v. *Pinto*, *supra*, 646 F.2d at 838; *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. Thus, our construction of Section 1014 does not displace the authority of the states. Rather, it complements state law enforcement in an area where the federal interest is substantial. See *United States* v. *Turkette*, *supra*, slip op. 9 n.9: "The states remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute [violations of Section 1014] is no restriction on the separate administration of criminal justice by the states."

The two counts of the indictment charging petitioner with violations of Section 1014 closely track the language of the statute and clearly apprise petitioner of the provisions of federal law that he violated. It is well settled that an indictment which tracks the language of the statute, advises the defendant of the elements of the offense and the nature of the charges against him, and allows him to plead a conviction or acquittal as a bar to subsequent prosecution, is sufficient to withstand attack. *United States* v. *Bailey*, 444 U.S. 394, 414 (1980); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *United States* v. *Young*, *supra*, 618 F.2d at 1286; *United States* v. *Fleming*, 526 F.2d 191, 192 (8th Cir. 1975), cert. dismissed, 423 U.S. 1028 (1976); *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). Petitioner cannot seriously contend that Counts II and III of his indictment fail to meet these requirements.[27]

Petitioner asserts (Pet. Br. 13) that notwithstanding the sufficiency of the indictment under Section 1014, he cannot properly be convicted of check kiting because the indictment nowhere uses the term "check kiting." The indictment, however, clearly outlines the underlying facts that constitute "check kiting." It is immaterial that the scheme is not labelled in the fashion that petitioner suggests. Counts II and III of the indictment allege that petitioner presented checks for deposit with the implicit representation "that said check[s] [were] of a value equal to the face amount of the check[s], when in truth and fact as [petitioner] then well knew, there were no sufficient funds" to cover the checks. It is further alleged

[27] See note 2, *supra*.

that this was done "for the purpose of influencing" the respective banks "upon an advance of money and extension of credit" (J.A. 3-4). These allegations are clearly descriptive of check kiting, "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks." *Falconi* v. *FDIC*, 257 F.2d 287, 289 (3d Cir. 1958). It would indeed be a strange result for this indictment to be held insufficient because, while it described the elements of petitioner's crime under 18 U.S.C. 1014, it failed to attach a colloquial label—"check kiting"—to the offense. See, *e.g.*, *Russell* v. *United States*, *supra*, 369 U.S. at 763 ("[c]onvictions are no longer reversed because of minor and technical deficiencies [in the charging papers] which did not prejudice the accused," quoting *Smith* v. *United States*, 360 U.S. 1, 9 (1959)).

A related argument advanced by petitioner is that Section 1014 is an improper vehicle to prosecute check kiting because it permits conviction without proof of an intent to defraud (Pet. Br. 35-37). This argument seriously misconstrues the question before the Court. The question to be decided is not whether "check kiting" requires an intent to defraud in order to be culpable, but rather whether "check kiting" of the type practiced by petitioner falls within the reach of a statute prohibiting intentional misrepresentations made for the purpose of influencing a federally insured bank to extend a loan, commitment, or advance. Whatever the requirements of other bad check or fraud statutes, "check kiting" of the kind practiced by petitioner is clearly within the unambiguous scope of Section 1014.

Section 1014, moreover, is not, as petitioner asserts (Pet. Br. 36), "virtually a strict liability statute."

While Section 1014 does not require that a protected financial institution rely to its detriment on a false statement or willfull overvaluation, or that a defendant actually intend to defraud the institution by causing economic loss (*United States* v. *Sabatino*, 485 F.2d 540, 544-545 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974)),[28] it does include a mens rea requirement (*ibid.*). The defendant must be guilty of intentional, culpable conduct to be convicted under Section 1014. The statute requires the government to prove that the defendant made a knowingly false statement or willfully overvalued property or security for the express purpose of influencing the action of a federally insured financial institution upon an advance, commitment or loan. *Ibid.* In a check kiting prosecution under Section 1014, the government must show that the defendant presented an intentionally overvalued check for the purpose of obtaining an extension of credit.[29] This conduct, which the Fifth Circuit has called "[t]he essence of check kiting" (*United States* v. *Payne*, *supra*, 602 F.2d at 1218), exposes financial institutions to a serious risk of loss and properly falls within the scope of Section 1014.[30]

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[28] Since the gravamen of the offense under Section 1014 is merely the defendant's intent *to influence* a bank or lending institution, whether or not the institution actually relies on a misrepresentation or whether the defendant carries the misrepresentation to the point of actually defrauding the institution is completely irrelevant. *United States* v. *Sabatino*, *supra*, 485 F.2d at 544-545.

[29] The trial judge in this case repeatedly charged the jury that petitioner could not be convicted unless he acted with an intent "to deceive the bank", and that the government must prove that he "knowingly and willfully [made] a false statement of a material fact" (J.A. 37, 38).

[30] See note 7, *supra*.

There may indeed be other statutes prohibiting "check kiting" that require additional or perhaps even stricter elements of proof (Pet. Br. 37), but that does not disable Congress from prescribing its own standards under Section 1014. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431 n.8.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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